80-1089

No.

in the

Supreme Court

of the

United States

OCTOBER TERM 1980

SHAKESPEARE COMPANY, a Delaware corporation,
Petitioner,

vs.

FURY IMPORTS, INC., a New York corporation,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Respondent, Fury Imports, Inc., a New York corporation, responds to the Petition for Writ of Certiorari filed by the petitioner and directed to the decision of the United States Court of Appeals for the Fifth Circuit dated September 8, 1980, with rehearing denied December 3, 1980.

STATEMENT OF JURISDICTION

The petitioner indicates that this petition is taken pursuant to 28 U.S.C. §1254(1) providing for writs of certiorari to the United States Courts of Appeals. This court has adopted Rule 19(b), Rules of Supreme Court of the United States, indicating the following considerations for exercising discretionary review over the United States Court of Appeals:

> "Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

It is evident from the most summary review of the Petition for Writ of Certiorari that the petitioner fails to comply with these jurisdictional requirements. The petitioner raises no constitutional issues. The petitioner cites no federal statutes. The petitioner cites two rules of evidence and one rule from the rules of procedure. One rule of evidence (403) grants to the trial judge broad discretion while the other rule of evidence (801) was never cited by the court of appeals. The rule of procedure (44.1) was never cited by the court of appeals.

The respondent respectfully submits that there is no basis for jurisdiction in this court and that the issues presented are issues only between the parties hereto and are not issues of substantial public interest. In effect, the petitioner has taken a second appeal to this court.

STATEMENT OF THE CASE

This cause has been tried twice by the district court and considered twice on appeal by the court of appeals. It would serve no useful purpose to submit a lengthy detailed analysis of all the facts and proceedings in the lower courts. The statement of the case submitted by the petitioner is substantially correct as to procedural facts but erroneous as to conclusions of law. The respondent will make further reference to the facts and issues in the argument portion of this brief.

REASONS FOR DENYING THE WRIT

I.

APPLICATION OF JUDICIAL DISCRETION UNDER FEDERAL RULE OF EVIDENCE 403 PROVIDES NO BASIS FOR SUPREME COURT JURISDICTION.

The petitioner's premise is that this court has not decided a case dealing with Federal Rule of Evidence 403 since the rules were adopted. This is an erroneous statement. In *Goldberg v. United States*, 425 U.S. 94, 96 S.Ct. 1338, 47 L.Ed.2d 603 and *Norfolk and Western Railway Company v. Liepelt*, _____U.S._____, 100 S.Ct.

_____, 62 L.Ed.2d 689, this court upheld the broad judicial discretion given under FRE 403. There is no hint from these decisions that this court is about to limit the discretion of the trial court under FRE 403.

There was good reason for the ruling of the district judge and the court of appeals. In the first trial the trial judge required the damages to be computed on an annual basis (32a). Thus, if 150,000 reels were ordered for 1970 (for example), and 150,000 reels were not received in that year, the damages for 1970 were computed on the deficiency. The facts indicated that reels were being shipped constantly and it would be difficult to determine which reels applied to which order. The contract was not terminated until 1973. The trial judge felt that a remark by counsel referring to damage allocations under the special verdict should not be distorted into something it was never intended to be (84-85a).* The facts indicated that the remark would be misleading and confusing to the jury (84a). The court of appeals agreed with the trial judge's exercise of discretion under Federal Rule of Evidence 403 (8a). This court does not review discretionary evidentiary rulings after the court of appeals has found no abuse of discretion.

*Reference is to petitioner's appendix.

II.

FEDERAL RULE OF CIVIL PROCEDURE 41(a)(2) WAS NEITHER VIOLATED NOR CONSIDERED BY THE DISTRICT COURT OR THE COURT OF APPEALS AND THUS PROVIDED NO BASIS FOR THIS COURT'S JURISDICTION.

Federal Rule 41(a)(2) relates to the dismissal of actions by a party. It does not deal with the question of damages. In the first opinion of the court of appeals, it was noted (35a-footnote 16):

> "Shakespeare can be held liable only for those breaches by Omori that it induced. This is a substantial point on the facts of this case. For instance, there was evidence that Omori was in financial trouble in 1969-70, which might have affected its capacity to produce reels. In addition, it is possible that Omori breached the contract in part even before it entered the agreement with Shakespeare under which it agreed to stop dealing with Fury."

At the second trial, respondent concluded that the shortages in 1970 resulted from Omori's production problems and not Shakespeare's interference. Since even Shakespeare conceded that the interference took place on June 10, 1970, and called for action by Omori one year later, it was difficult to conclude that the shortages in 1970 were the result of Shakespeare's interference.

The trial judge never applied Rule 41(a)(2). The court of appeals never referred to the rule. It is axiomatic that this court cannot consider a matter not considered below.

III.

DISTRICT COURT PROPERLY FOLLOWED THE "LAW OF THE CASE" RULE WHEN RETRYING THIS CAUSE AFTER OPINION AND MANDATE OF THE COURT OF APPEALS.

The petitioner fails to present the true facts in this cause. At the first trial, the trial judge held that New York law governed the question of punitive damages. After the verdict, the trial judge held that punitive damages should not have been awarded, again applying New York law (46a). On appeal, the court of appeals reversed the judgment n.o.v., and held that under New York law punitive damages were properly awarded but, since a new trial was required on compensatory damages, a retrial was also required on punitive damages (35-38a). On the first appeal, Shakespeare raised the question of whether Japanese law governed the punitive damages issue (see A 1-2).* The court of appeals rejected this argument and held that the trial judge properly applied the parties' stipulation of New York law (39a-footnote 19). At the second trial, Shakespeare again tried to inject Japanese law into the punitive damages issue (48-49a, 70a). The trial judge properly followed the opinion and mandate of the court of appeals (12a). When this issue was raised in the second appeal, the court of appeals held that the trial judge correctly followed the first opinion (3-4a).

The foregoing events indicate that both the trial judge and the court of appeals were entirely correct. There is no further issue for this court to consider.

*Reference is to respondent's appendix.

IV.

THE COURT OF APPEALS PROPERLY FOLLOWED THE STATE LAW OF NEW YORK IN RULING THAT THE STATUTE OF LIMITATIONS DOES NOT COMMENCE UNTIL A BREACH OCCURS.

The court of appeals held that the statute of limitations does not begin until a cause of action accrues. The court held that a cause of action does not accrue until a breach occurs, citing numerous New York decisions (4-8a). After the decision in the second appeal, the petitioner called to the attention of the court a recent New York decision in *Guard-Life Corp. v. S. Parker Hardware Manufacturing Corp.*, 50 N.Y.2d 183, 428 N.Y.S.2d 628, 406 NE2d 445 (1980). The court of appeals carefully considered this decision and concluded that this new decision did not change the existing New York law that a cause of action accrues only when there is a breach (9-10a).

The petitioner's reliance upon *Day & Zimmerman, Inc. v. Challoner*, 423 U.S. 3, 96 S.Ct. 167, 46 L.Ed.2d 3, is misplaced. The *Challoner* case dealt with a federal court in a diversity action refusing to apply the state's choice-of-law rules to a personal jury claim which occurred in Cambodia. In the instant case, the court of appeals considered the recent New York case *(Guard-Life)* and found that it did not change the New York rule that the cause of action did not accrue until there was a breach of contract by Omori. The court of appeals' interpretation of the New York law was correct and provides no basis for jurisdiction in this court.

CONCLUSION

For the reasons stated herein, the petition for writ of certiorari should be summarily denied.

Respectfully submitted,

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Appendix

EXCERPTS FROM SHAKESPEARE'S APPELLEE-CROSS APPELLANT'S BRIEF IN CASE NO. 75-2421 (PAGES 46-47)

B. If Japanese Law Applies As To Punitive Damages, It Precludes An Award Of Punitive Damages In This Case.

At trial, Shakespeare offered to prove that the concept of punitive damages was entirely absent from Japanese jurisprudence, and Fury's counsel accepted the proffer, App. 919-c, Tr. p. 964, waiving any objections.

The issue of applicability of Japanese law to the punitive damage issue was clearly reserved in the stipulation of the parties that the New York law was the law of the forum, and was brought to the attention of the Court through a Motion to Strike filed on September 11, 1974. (App. 29-33, R. 297-301). Certain Japanese statutes, in English translation, were appended to Shakespeare's Motion, and are set forth in pertinent part, in the Addendum, Par. I. Shakespeare argued that the Court was bound to apply Florida's choice of law rules, *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941); *Griffin v. McCoach*, 313 U.S. 498 (1941); *Gillies v. Aeronaves de Mexico, S.A.*, 468 F.2d 281 (5th Cir. 1972), *cert. denied* 410 U.S. 931 (1973); and that Florida's conflict of law rules mandated the Japanese law as the law applicable to the punitive damage issue, *Hopkins v. Lockheed Aircraft Corp.*, 201 So.2d 743, *rev'd on rehearing*, 201 So.2d 749 (Fla. 1967); *Kilmer v. Gustason*, 211 F.2d 781 (5th Cir. 1954). See also, *Franklin Supply Co. v. Tolman*, 454 F.2d 1059 (9th Cir. 1972) (in an action brought in U.S. District Court in California

against an accounting firm for a faulty audit in Venezuela, held, alternatively, California law governed choice of law of punitive damages; under California's "most significant relationship" test, Venezuela had most significant relationship to occurrences involved in punitive damage issue; and since Venezuela law did not recognize punitive damages, they were not proper); *James, supra.*

Shakespeare's argument was rejected by the District Judge, and the New York law of punitive damages was held to apply (App. 56, 59-60, R. 557, 560-561). If the District Court was in error in this regard, and if the Japanese law applies to the issue of punitive damages, then an award of punitive damages is precluded in this case, and the judgment notwithstanding the verdict ought to be affirmed in this respect.

C. *Because An Award Of Punitive Damages Is Precluded As A Matter Of Law In This Case, The District Court's Judgment Notwithstanding The Verdict Ought To Be Affirmed As to Punitive Damages, Even If It is Reversed As To Liability And Compensatory Damages.*